Supreme Court, U. S.
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No. 79-1999

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

FRANKLIN PROPERTY COMPANY,
D/B/A THE HILTON INN,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

and

HOTEL, MOTEL, RESTAURANT EMPLOYEES AND BARTENDERS UNION LOCAL 12, HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION,

Respondents.

BRIEF OF RESPONDENT HOTEL, MOTEL, RESTAURANT EMPLOYEES AND BARTENDERS UNION, LOCAL 12 IN OPPOSITION TO GRANT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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COUNTER STATEMENT OF FACTS

In Petitioner's statement of facts, counsel states that employee Evelyn Link had told the employer's General Manager, William Green, that "she was not in favor of the union and that she would assist him in the event of a

union campaign." Counsel cites the decision of the administrative law judge (13a) to support this contention. There are two paragraphs in the administrative law judge's decision dealing with Green's interrogation of Evelyn Link. The first paragraph sets out the facts of the August 24 incident.

The second paragraph reads as follows:

> "In this regard, Link's testimony stands uncontradicted and, indeed, Green admitted that early in the campaign, he was left with the impression by Link that she was not for the Union and that he could count on her if he wanted any help in fighting organization. I credit Link in this instance. In so finding, considering the total circumstances, including the lack of any justifiable purpose in Green's inquiries, I do not regard this incident as fitting the class of casual, isolated interrogation which the Board has deemed noncoercive or too minimal to warrant a remedy. I find that Respondent violated Section 8 (a) (1) of the Act by Green's questioning Link as to her own and as to the union activity of other employees." (13-14a)

The underlying premise of Petitioner's claim is that Link had in fact volunteered to assist Green. Such is not the case. Link did not testify concerning whether or not she had volunteered and all Green ever stated was that he had an "impression" that Link would help. The administrative law judge, while referring to the fact that Green might have had that impression did not make any credibility resolution concerning this supposed incident. The Judge stated: ". . . I do not regard this incident as fitting the class of casual, isolated interrogation which the Board has deemed non-coercive or too minimal to warrant a remedy." It is clear that the only matter under considera-

tion by the Judge is the August 24 incident, not a question of whether Link had volunteered to assist Green. Petitioner's entire brief is grounded in this false premise and, as such, the brief and Petitioner's arguments must fail.

ARGUMENT AGAINST GRANTING THE WRIT

1. THERE IS NO REAL QUESTION PRESENTED TO THIS COURT FOR REVIEW.

Petitioner's entire appeal is grounded on the premise that there can be no Section 8 (a) (1) violation of the Act if an employee previously agreed to assist in the event of a union campaign. Even if that premise were correct the Court should deny the Petition for Writ for the simple reason there is not one iota of credited evidence which indicates that an employee ever offered to assist the employer in the event that a union tried to get in. Hence, there is no question presented for review.

2. THE QUESTIONING OF LINK WAS NOT "A CASUAL INQUIRY, DEVOID OF ANY THREATS".

Petitioner's counsel in his argument for granting the writ argues the theory that Green's questioning of Link was: ". . . a casual inquiry, devoid of any threats . . ." The facts reflected that Green had asked Link if she knew anything about the union cards and union campaign. He informed Link he was confident that if she knew anything, she'd let him know. Green also asked if Link's shift was involved and questioned her as to whether or not she had been contacted at home by union organizers. (13a) That conversation can hardly be classified as "casual" when the

plain meaning of the questions reflect point blank interrogation about an employee's union activity and the union activities of others. Clearly, the Court of Appeals was correct in affirming the decision that the employer had violated the act by his questioning of employee Link.

3. THE QUESTIONING OF LINK WAS NOT "ISOLATED" FROM THE OTHER SECTION 8(a)(1) VIOLATIONS.

Respondent's counsel next argues that the Board and Courts of Appeals have consistently held that "a casual inquiry regarding union activities, isolated from other unfair labor practices, does not violate the act." Counsel completely misses the mark by asserting that the Link inquiry was isolated. That questioning occured at the end of August, the interrogation and threats to employee Schoemer occured in early October, and the interrogation and threats to Donahue and the threats to Link and Pauley occured in the early part of November. Clearly, the violations were not isolated. They all fit together not only in time, but also because they were all carried out by top management with an intent to coerce employees and to interfere with their protected rights.

4. THERE IS NO SIGNIFICANT ISSUE WHICH SHOULD BE DECIDED BY THIS COURT.

Since the Link questioning was not a casual inquiry, devoid of any threats and not isolated from the other Section 8 (a) (1) violations, Petitioner's basis for seeking review evaporates.

Counsel's argument, carried to its logical conclusion, would mean that an employer could never violate Section 8 (a) (1) of the Act as to an employee if the latter had previously volunteered to assist the employer. Such argument is patently absurd.

5. THE CASES CITED BY PETITIONER ARE FACTUALLY DISTINGUISHABLE AND DO NOT SUPPORT COUNSEL'S ARGUMENT.

The Court should exercise a great deal of caution in reviewing the cases cited by Petitioner. Not only are they factually distinguishable, but do not, for the most part, support the arguments which counsel is attempting to make.

In the *Arvin Industries Inc.* case, 226 NLRB 925, the sole supervisory question was "how an employee meeting had gone the previous evening". In holding there was no violation, the Court found the supervisor in question had given assurances to the employee of his right to organize and found the employer engaged in no other unlawful conduct – hardly the same facts as the instant case.

The *Pepsi Cola Bottling Company* case, 211 NLRB 870, dealt with a supervisor who asked an employee, whom he knew on a first name basis, about his union sentiments. The Board grounded its decision on the basis that the conversation was the only incident of employer questioning, was casual and informal, and took place in an amicable atmosphere. In the instant case, Green called Link on the telephone while she was on duty. Further, this was not the only incident where the employer coercively questioned employees.

Petitioner's counsel is completely in error in claiming that the *Sentry Food Store* case, 198 NLRB 879, supports the proposition that "lack of evidence of coercion or threats of reprisal fails to suport allegations of Section 8 (a) (1) violations where the supervisor asks a number of employees whether 'there was any talk about unions' ". In that case the questioning concerned only one employee, was not intimidating or coercive, and there were no other incidents of questioning or other forms of interference with employee rights.

Rotek Inc., 194 NLRB 453, is inapplicable since in that case the Board found it unnecessary to decide the Section 8 (a) (1) questions involved.

In the *Federal Mogul* case, 566 F. 2d 1245, (5th Cir. 1977), counsel argues that interrogation of only a small number of employees will not support a finding of a violation. The Fifth Circuit, in *Federal Mogul,* did not discuss numbers, but only found there was no element of coercion or interference. That court also found that the questioning was done by low level supervisors over a two-year period, facts which are clearly different from those involved herein.

Penasquitos Village Inc. v. *National Labor Relations Board,* 565 F. 2d 1074, 9th Cir. 1977, dealt with the matter of credibility resolutions where the Board reversed the administrative law judge.

In the *W-I Canteen Service Inc.* v. *National Labor Relations Board* case, —— F.2d ——, 9th Cir. 1979, the Board and Courts are agreed that a decision finding a violation must be grounded in the "totality of circumstances" of each case. In the instant case, it is Petitioner's counsel who extracts the Link questioning from the other Section 8 (a) (1) violations and claims it is isolated and expects the

Court to overturn the decision of the Board and Sixth Circuit when it is clear they considered "the totality of the circumstances".

In the *National Labor Relations Board* v. *Welsh Industries Inc.* case, 385 F. 2d 538 (6th Cir. 1967) one of the owners of the business asked an employee if she had "signed a card" and asked another "how many union cards she had." The Court classified the questions as "innocuous". Yet, in the instant case, we have the highest management official calling an on-duty employee and interrogating her not only about her knowledge of the union's organizational activity, but pressuring her for information as to whether her shift was involved. That is hardly "innocuous".

In the *Hughes & Hatcher* v. *National Labor Relations Board case,* 393 F.2d 557 (6th Cir. 1967) the Court did not discuss the numbers of employees involved but simply dismissed the 8 (a) (1) allegation due to the lack of substantial evidence on the record.

6. THE DECISION OF THE SIXTH CIRCUIT DOES NOT RUN CONTRARY TO THE DECISIONS IN OTHER CIRCUITS AND DOES NOT CREATE A CONFLICT WITHIN THE COURTS OF APPEALS.

Petitioner's counsel in an incredulous atempt to gain the attention of the Court, asserts that "The decision of the Court of Appeals in the case at bar runs contrary to these and other decisions and creates a conflict within the Courts of Appeals that warrants review by this Court." There is not a scintilla of proof in Petitioner's brief supporting that proposition. There is no conflict within the Courts.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

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